

No. PD-0314-18

TO THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
7/11/2018  
DEANA WILLIAMSON, CLERK

JEREMY CUEVAS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Bee County

\* \* \* \* \*

**STATE PROSECUTING ATTORNEY'S  
MERITS BRIEF**

\* \* \* \* \*

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## **IDENTITY OF JUDGE, PARTIES, AND COUNSEL**

- \* The parties to the trial court's judgment are the State of Texas and Appellant, Jeremy Cuevas.
- \* The trial Judge was the Honorable Robert Cheshire, 156th District Court.
- \* Trial counsel for the State was Terence Breen, 111 South St. Mary's Street, Suite 203, Beeville, Texas 78102.
- \* Counsel for the State on appeal was District Attorney Jose Aliseda, 111 South St. Mary's Street, Suite 203, Beeville, Texas 78102.
- \* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.
- \* Counsel for Appellant at trial was Ysidro Arismendez, 604 North Washington, Beeville, Texas 78102.
- \* Counsel for Appellant on appeal is Travis Berry, P.O. Box 6333, Corpus Christi, Texas 78466.

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JEREMY CUEVAS,

Appellant

v.

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Appeal from Bee County

\* \* \* \* \*

**STATE PROSECUTING ATTORNEY'S  
MERITS BRIEF**

\* \* \* \* \*

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

An off-duty officer moonlighting as security is “lawfully discharging an official duty” for purposes of proving the “public servant” element for third-degree-felony assault when the officer enforces the Texas Alcoholic and Beverage Code. Why? First, this Court’s precedent establishes that an officer enforcing the law retains his official status even when off-duty. Next, the Alcoholic and Beverage

Code requires all officers to enforce its provisions and, in some cases, makes it an offense to fail or refuse to enforce it.

### **STATEMENT REGARDING ORAL ARGUMENT**

The State did not request oral argument, and the Court did not grant argument.

### **STATEMENT OF THE CASE**

Appellant was convicted of third-degree-felony assault on a public servant. His seven-year sentence of imprisonment was suspended, and he was granted community supervision for seven years. The Thirteenth Court of Appeals reversed, finding insufficient evidence to support the “public servant” element because, according to the court, Constable Clifford Bagwell was working off-duty in a private security capacity when he was assaulted. *Cuevas v. State*, No. 13-16-00220-CR, 2018 WL 1193029, at \*3-4 (Tex. App.—Corpus Christi–Edinburg Mar. 8, 2018) (not designated for publication). It reformed the judgment to the lesser offense of Class A Assault and remanded for a new punishment hearing. *Id.* at \*5-6. The court subsequently denied the State’s motion for rehearing.

### **ISSUE PRESENTED**

**Is a peace officer moonlighting as private security “lawfully discharging an official duty” for purposes of proving assault on a public servant when acting under TEX. ALCO. BEV. CODE § 101.07, which dictates: “all peace officers in the state” “shall enforce the provisions of this code.”**

## **SUMMARY OF THE ARGUMENT**

Off-duty police officers discharge their official duties when they enforce the law. Texas Alcoholic and Beverage Code Section 101.07 requires all officers to enforce the provisions of the Code. And Alcoholic and Beverage Code Section 28.10(b) prohibits a mixed-beverage-licensed establishment from allowing patrons to remove alcohol from the seller's premises. Further, it is an offense for a person to fail or refuse to abide by the Code. TEX. ALCO. BEV. CODE §§ 1.05, 101.61. Therefore, an officer moonlighting as security who enforces Section 28.10(b) is "lawfully discharging an official duty" for purposes of proving third-degree-felony assault on a public servant under Texas Penal Code Section 22.01(b)(1).

## **FACTS**

Appellant was convicted of assault on a peace officer (a public servant), which requires, among other things, proof that the officer was "lawfully discharging an official duty" at the time of the assault. *See* TEX. PENAL CODE § 22.01(a)(1), (b)(1). The events surrounding the offense, as set out by the court of appeals, are as follows:

Appellant was charged by indictment for assaulting Clifford Bagwell, a Bee County Constable, while Bagwell was discharging an official duty. . . . The alleged assault took place while appellant was attending a wedding reception at the Grand Dance Hall (the Grand) in Bee County, Texas. At the time, Bagwell was moonlighting in a security capacity for the Grand, along with his twin brother Clinton. The indictment alleged that at the time of the assault, Bagwell was lawfully discharging an official duty by 'keeping [appellant] from entering [the Grand] at the request of [the Grand's] employee, and while trying to keep the peace.'



Clinton testified that his duties at the Grand included carrying beer to the bar, cleaning up, and taking care of 'the house rules.' Clinton explained that the Grand prohibits its patrons from taking alcohol outside the premises to protect its beer and liquor licenses. On the night in question, a Grand employee notified Clinton that appellant went outside with a beer. Clinton informed appellant he could not have alcohol outside the dance hall and requested that appellant return inside. Appellant, who appeared to be intoxicated, responded with vulgarities and refused to comply. Clinton then asked another patron to talk to appellant so that 'we could take care of the problem without any other trouble.' Appellant subsequently reentered the Grand.

Clinton testified that he later confronted appellant a second time for bringing alcohol outside the licensed premises. Appellant complied with Clinton's request to return inside, but shortly thereafter appellant again went outside with alcohol. Clinton then sought assistance from Bagwell and the two approached appellant. Clinton reminded appellant of the two previous warnings and informed him, 'because you have done it before, we're not going to let you back inside.' Appellant indicated his disagreement and attempted to push through Clinton and Bagwell. Clinton stated that he and his brother responded by pushing appellant against a nearby vehicle and holding him there. During the struggle, another patron hit Clinton on the back of his head. While he was defending himself, Clinton saw appellant jump on Bagwell and take him to the ground. He also observed appellant striking Bagwell with his fists. Shortly thereafter, someone pulled appellant away and removed him from the area.

Bagwell testified that he was working security for the Grand that evening and was attired in a constable uniform. He recalled Clinton informing him that there was a patron outside with a beer and they were to deny him re-entry. Bagwell approached appellant with Clinton. He then took appellant's beer and poured it out. Bagwell told appellant he could not reenter, and appellant responded by pushing his way through Bagwell and Clinton. The two brothers then pushed appellant up against a nearby vehicle. At that point, Bagwell saw another person, later identified as appellant's brother Greg Cuevas, fighting with Clinton. Greg 'took a swing' at Bagwell, who responded in kind. According to Bagwell, appellant then jumped on him and began striking him while driving him to the ground. During the fall, Bagwell hit his head on a

nearby building. He experienced soreness in his shoulder and back for some time afterward. Bagwell was able to regain his footing and observed that other patrons were removing appellant from the scene.

Bagwell testified that he called the Bee County Sheriff's Department and 'advised them of a 10-10, which is a fight at The Grand; officer involved.' A sheriff's deputy arrived shortly and arrested appellant. When asked by the State whether he was trying to 'keep the peace out there when you were dealing with [appellant,]' Bagwell responded, 'trying to keep the peace and keep the rules of the establishment intact.' On cross-examination, Bagwell agreed that criminal trespass did not 'come into play' regarding his encounter with appellant.

Jason Cuevas, appellant's brother, testified that he saw appellant arguing with Bagwell. He stated that during the argument, 'almost the entire Grand, from what it felt like, came out those side doors and caused a big ole [sic] bum-rush of people.' Jason continued, 'When the people came out, the door was shoved open, and it hit [Bagwell] in the back, and up against the building is where he fell.' Two other patrons testified regarding their observations, but neither was present at the time of the alleged assault.

Appellant called Ryan Trevino, a Bee County sheriff's deputy, as a witness. Officer Trevino, who responded to the scene that night, testified that multiple unidentified witnesses claimed that Clinton was the initial aggressor.

The jury returned a guilty verdict. This appeal followed.

*Cuevas*, 2018 WL 1193029, at \*1-2.

## ARGUMENT

Texas Penal Code Section 22.01, titled “Assault,” provides for enhancement of the offense level if it is committed against a police officer discharging a duty:

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

(1) a person the actor knows is a public servant *while the public servant is lawfully discharging an official duty*, . . .

TEX. PENAL CODE § 22.01(b)(1) (emphasis added).

### **1. As a General Rule, When a Peace Officer Enforces the Law, the Officer is “Lawfully Discharging an Official Duty.”**

This Court has recognized that “‘a police officer’s ‘off-duty’ status is not a limitation upon the discharge of police authority . . . since an officer is for many purposes on duty 24 hours a day.’” *Moore v. State*, 562 S.W.2d 484, 486 (Tex. Crim. App. 1978) (citing *Wood v. State*, 486 S.W.2d 771, 774 (Tex. Crim. App. 1972); *Monroe v. State*, 465 S.W.2d 757, 758-59 (Tex. Crim. App. 1971); *Simms v. State*, 319 S.W.2d 315, 317 (Tex. Crim. App. 1958)). Both *Monroe v. State* and *Thompson v. State* had facts similar to this case. In *Monroe*, a Houston PD officer was working an “extra job” at the Breezeway Nightclub when he was assaulted by Monroe upon arresting her husband for public intoxication. 465 S.W.2d at 758. The Court held: “The arrest was, under these facts, a legal arrest, and a police officer being on duty 24 hours a day was in the performance of his duties.” *Id.* at 759. Next, in *Thompson*, this Court held that an off-duty officer in plain clothes, who was moonlighting as an

apartment-home security guard, was discharging his duties when he was assaulted while trying to break up a rowdy party. 426 S.W.2d 242, 243 (Tex. Crim. App. 1968); *see also Horn v. State*, 463 S.W.2d 14, 15 (Tex. Crim. App. 1971) (upholding peace officer element under “almost identical facts.”).

Additionally, though not as analogous as *Monroe* and *Thompson*, the Court has affirmed the “discharging an official duty” element in two other cases. In *Selvage v. State*, the Court held that a sheriff’s deputy who had been shopping in a jewelry store was lawfully discharging his official duty when he was shot by Selvage. 680 S.W.2d 17, 21 (Tex. Crim. App. 1984). Even though the deputy had been in the store to conduct “personal business,” the owner told the deputy he was fearful of Selvage and, as a result, the deputy assumed his peace officer status by identifying himself as such and confronting Selvage. *Id.* And in *Hafdahl v. State*, the Court held that the officer who stopped at the scene of an accident and approached Hafdahl shouting, “halt, halt, stop, police” was no longer off-duty. 805 S.W.2d 396, 401 (Tex. Crim. App. 1990), *overruled on other grounds by Madden v. State*, 799 S.W.2d 683, 686 n.3 (Tex. Crim. App. 1990). “He was investigating a traffic accident as required by his job as an Amarillo police officer. Any rational trier of fact could have found that the deceased, at the time of his death, was acting in the lawful discharge of an official duty as alleged in the indictment.” *Id.*

## **2. Peace Officers Enforcing the Texas Beverage and Alcoholic Code are “Lawfully Discharging an Official Duty.”**

Section 101.07 of the Beverage and Alcoholic Code, titled “Duty of Peace Officers,” states: “All peace officers in the state, including those of cities, counties, and state, shall enforce the provisions of this code and cooperate with and assist the commission in detecting violations and apprehending offenders.” TEX. ALCO. BEV. CODE § 101.07; *see also* “Texas Peace Officer’s Guide to the Alcoholic Beverage Code” (Aug. 2017), available at <http://www.tabc.state.tx.us/laws/other/PeaceOfficersGuide.pdf>. An officer who fails or refuses to enforce the Code would be subject to criminal liability. Under Section 101.61, it is a violation to fail or refuse to follow a requirement of the Code. TEX. ALCO. BEV. CODE § 101.61 (“Violation of Code or Rule” under “Miscellaneous Offenses” in Subchapter D). And the failure or refusal to comply is a misdemeanor offense punishable by a fine of not more than \$1,000 or by confinement in the county jail for not more than one year or both. TEX. ALCO. BEV. CODE § 1.05 (general penalty provision).

## **3. Peace Officers Enforcing the Obligation of a Permittee to Prevent the Unlawful Removal of Alcoholic from a Premises are “Discharging an Official Duty.”**

Section 28.10 of the Alcoholic and Beverage Code prohibits a business with a mixed beverage permit from allowing a person to remove an alcoholic beverage

from the seller's premises. TEX. ALCO. BEV. CODE § 28.10(b).<sup>1</sup> A permittee who fails or refuses to comply by allowing a patron to remove an alcoholic beverage would be subject to criminal liability under the Code. TEX. ALCO. BEV. CODE §§ 1.05, 101.61.

#### **4. The Thirteenth Court of Appeals Disregarded the Law; Bagwell was “Lawfully Discharging an Official Duty.”**

Bagwell had a legal duty to enforce the Alcoholic and Beverage Code and identify and prevent the commission of an offense. He was therefore “discharging an official duty.”

Though the court of appeals accepted the principle that peace officers do not lose their official status when off-duty, the court concluded that Bagwell was acting in a “private security capacity.” *Cuevas*, 2018 WL 1193029, at \*3. According to the court, he was not investigating or preventing the commission of a crime or

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<sup>1</sup> The following two exceptions to subsection (b), TEX. ALCO. BEV. CODE § 28.10(b)(1) and (2), are not implicated here:

(1) a person who orders wine with food and has a portion of the open container remaining may remove the open container of wine from the premises; and

(2) a mixed beverage permittee who also holds a brewpub license may sell or offer without charge on the premises of the brewpub, to an ultimate consumer for consumption on or off the premises, malt liquor, ale, or beer produced by the permittee, in or from a lawful container in an amount that does not exceed one-half barrel, provided that the aggregate amount of malt liquor, ale, and beer removed from the premises under this subdivision does not exceed 1,000 barrels annually.

seeking to arrest Appellant for an offense. *Id.* Recognizing Section 28.10's directive to permitted establishments, the court concluded that "there is no corresponding provision imposing criminal liability for someone who possesses alcohol outside the premises of a permittee." *Id.* at \*3 n.4. Thus, the court of appeals held that the evidence was insufficient to support the "public servant" element for third-degree-felony assault. *Id.* at \*3-4.

The court of appeals was wrong. And it disregarded clear and plain case law and statutes supporting the opposite conclusion. Appellant's criminal liability for removing the drink from the Grand misses the point. Alcoholic and Beverage Code Section 101.07, without exception, required Bagwell, as a peace officer, to enforce Alcoholic and Beverage Code Section 28.10. The Bagwell brothers and the Grand understood this obligation. Clinton testified that the Grand has both a beer and mixed drink license "and at no time during -- while they are having a function out there and liquor and beer is being sold, it can't be taken outside unless it's taken to the patio in the back which is part of the licensed premises." 3 RR 26-27. Bagwell testified that it is against the law for a patron to take an open container outside the dancehall and explained that, in preventing Appellant from re-entering, he was enforcing the law. 3 RR 55, 64. If the Grand did not enforce the conditions of its licenses, Bagwell stated, it could lose them. 3 RR 27; *see also Cuevas*, 2018 WL 1193029, at \*1 ("When asked by the State whether he was trying to 'keep the peace

out there when you were dealing with [appellant,]’ Bagwell responded, ‘trying to keep the peace and keep the rules of the establishment intact.’”). Additionally, had Bagwell failed or refused to enforce Section 28.10, both Bagwell and the Grand would have been subject to criminal liability. *See* TEX. ALCO. BEV. CODE §§ 1.05, 101.61.

In conclusion, considering Alcoholic and Beverage Code Sections 1.05, 28.10(b), 101.07, and 101.61, Bagwell was “lawfully discharging an official duty” as required under TEX. PENAL CODE § 22.01(b)(1) when he was assaulted. The evidence was therefore sufficient to support Appellant’s conviction for third-degree-felony assault on a peace officer. *See* TEX. PENAL CODE § 22.01(a)(1), (b)(1).



### **PRAYER FOR RELIEF**

The State of Texas prays that the Court of Criminal Appeals reverse the decision of the court of appeals and reinstate the trial court's judgment.

Respectfully submitted,

*/s/ Stacey M. Soule*  
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### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that according to Word's word-count tool this document contains 2,367 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

*/s/ Stacey M. Soule*  
State Prosecuting Attorney

## **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the State's Prosecuting Attorney's Merits Brief has been served on July 11, 2018, *via* email or certified electronic service provider to:

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